No. 172

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, THE CITY OF [illegible], A MUNICIPAL COMPANY, A CORPORATION, [illegible], TRUSTEE, STATE OF [illegible], FERRY COUNTY, [illegible]

Un[illegible]

ON PETITION FOR [illegible]
STATES CIRCUIT [illegible]

BRIEF FOR [illegible]

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No. 172

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, THE CITY BANK FARMERS TRUST COMPANY, A CORPORATION, AND RALPH E. MORTON, AS TRUSTEE, STEVENS COUNTY, WASHINGTON, AND FERRY COUNTY, WASHINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 116–132) is reported in 41 F. Supp. 119. The opinion of the circuit court of appeals (R. 332–338) is reported in 135 F. (2d) 541.

JURISDICTION

The judgment sought to be reviewed was entered April 30, 1943 (R. 338). A petition for rehearing was denied June 5, 1943 (R. 339.) The petition for a writ of certiorari was filed July 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the owner of lands bordering on a navigable stream is entitled to recover compensation for their power site value when such lands are condemned by the United States for the improvement of navigation.

2. Whether the United States, when it condemns land after taxes have been levied and assessed but before a lien attaches as between a grantor and grantee, is required to pay the amount of those taxes in addition to the reasonable value of the land condemned.

STATUTE INVOLVED

Section 11265, Wash. Rev. Stat. Ann. (Remington, 1932, as amended) [Laws, 1935, c. 30, sec. 7, as amended by Laws, 1939, c. 206, sec. 45, p. 766] provides:

> The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but

as between a grantor and grantee such lien shall not attach until the fifteenth day of February of the succeeding year. * * *

STATEMENT

The United States on December 9, 1939, instituted condemnation proceedings (R. 2–20), accompanied by a declaration of taking (R. 20–31), to acquire from the Washington Water Power Company 330.31 acres of land riparian to the Columbia River at Kettle Falls, Washington—land which was to be flooded by the backwater from the Grand Coulee Dam, a multiple purpose structure designed (among other things) to control the floods, improve the navigability, and regulate the flow of the Columbia River (R. 96). Act of August 30, 1935, 49 Stat. 1028, 1039–1040.

The facts are not in dispute and may be summarized as follows: The lands described in the condemnation petition and declaration of taking are part of a larger tract acquired by the Washington Water Power Company in 1921 at a cost of $150,000 (R. 103, 119, 145). The lands are riparian to the Columbia River, a stream navigable "throughout its entire length in the United States" (R. 44). The condemned area includes 34.09 acres of upland on the right bank of the Columbia River in Ferry County, 207.37 acres of upland on the left bank in Stevens County, and two intervening islands (88.85 acres) likewise in

Stevens County (R. 31). These lands are so situated that, prior to the construction of the Grand Coulee Dam and the backing of the water 151 miles up the river to the Canadian border (R. 96), there could have been constructed, partly on the lands of the Washington Water Power Company and partly on lands in the bed of the river, a hydroelectric power plant at an initial cost of approximately $9,000,000 (R. 46, 120). Before such a project could have been constructed, it would have been necessary for the Washington Water Power Company to have acquired a flowage easement over 518 parcels of land in 400 different ownerships—state, federal, and private—for reservoir purposes (R. 54).

The parties stipulated, in advance of the trial, that the lands which are being condemned "have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars ($7,950.35)" (R. 45).

At the trial the condemnee proffered evidence of the power site value of the lands in question. The Government objected to this evidence, contending (1) that under the rule laid down in *United States* v. *Chandler-Dunbar Co.*, 229 U. S.

53, and followed in *Continental Land Co.* v. *United States,* 88 F. (2d) 104 (C. C. A. 9), certiorari denied, 302 U. S. 715, "a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States and is, therefore, barred from a recovery for any power site value of its riparian lands" (R. 117); and (2) that inasmuch as the proposed dam at Kettle Falls would have flooded 518 tracts of privately owned land in 400 different ownerships (including lands owned by the United States and the State of Washington) the condemnee was not entitled to recover power site value because of the rule that "no owner of any one or any number of tracts less than the whole is entitled to be paid for a share of the value of the whole in condemnation proceedings unless there is a reasonable probability that all the ownerships could be combined" (R. 117).

The trial court, after examining the record, briefs, and decision in the *Continental Land Company* case, concluded that the evidence offered by the Washington Water Power Company was indistinguishable in principle from the evidence stricken in that case, and, accordingly, sustained the Government's objections (R. 116–132).

The taxing officials of Ferry and Stevens Counties, who had been made parties defendant because of their alleged tax liens against the property being condemned, raised one other issue dur-

ing the trial. They introduced evidence as to taxes which had been levied (R. 66–70, 79–82) and assessed (R. 73–78, 83–85) in 1939 (payable in 1940), but which had not been discharged. The court decided that the counties could recover these taxes from the Government (R. 115–116).

No issues of fact remaining, the court accordingly directed the jury to return a verdict for the Washington Water Power Company in the amount agreed upon by the parties as the value of the property exclusive of its adaptability for power site purposes, and, in addition, to return tax verdicts for Stevens and Ferry Counties in the sum of $3,003.96 (R. 247–248, 303–304). The Government excepted to the latter instructions and to the court's refusal to charge the jury that the taxes should be deducted from the stipulated value of the property ($7,950.35). The Washington Water Power Company appealed from the rulings as to power site value (R. 307), and the United States filed a cross-appeal on the tax question (R. 319–320).

The circuit court of appeals affirmed the judgment of the district court insofar as it allowed no compensation for power site value, relying upon its earlier decision in *Continental Land Co.* v. *United States,* 88 F. (2d) 104, certiorari denied, 302 U. S. 715, and reversed the judgment insofar as it made separate and additional awards to Stevens and Ferry Counties for 1940 taxes (R. 332–338).

ARGUMENT

1. The court below correctly ruled that just compensation does not require that the lands be valued in terms of their availability for water power purposes. The lands taken are in and adjacent to the Columbia River, a navigable waterway, which is subject to the plenary control of the United States. And since the availability of such lands for power purposes necessarily depends upon the flow of the navigable river it has been firmly established that the owner is not entitled, as against the United States, to compensation for any element of value attributable to the potential use of the lands for the generation of hydroelectric power. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Continental Land Co.* v. *United States*, 88 F. 2d 104 (C. C. A. 9), certiorari denied, 302 U. S. 715; see *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, 427. The decision below is squarely in accord with these principles and therefore does not call for further review.[1]

The correctness of the decision below is emphasized by the fact that the petitioners could not have placed a dam across a navigable river like

[1] Since the Columbia River is navigable throughout, there is not here presented the question argued but not decided in *United States ex rel. T. V. A.* v. *Powelson*, No. 3, 1942 Term, whether the rule of the *Chandler-Dunbar* case extends to lands adjacent to a non-navigable stream subject to federal control.

the Columbia without first having obtained a permit from the Federal Power Commission. Federal Power Act of June 10, 1920, as amended, 16 U. S. C. sec. 797 (e). In 1935 Congress authorized the construction of the Grand Coulee Dam and the backing of the waters of the Columbia River upstream beyond Kettle Falls to the Canadian border. Act of August 30, 1935, 49 Stat. 1028, 1039–1040. At no time thereafter would the Federal Power Commission have authorized the construction of private dam at Kettle Falls. Without the necessary permit, or the possibility of obtaining such a permit, the land had no power site value at the time of its condemnation in 1939.

Moreover, as the record shows (R. 54), petitioners could not have constructed a dam at Kettle Falls without first having obtained a flowage easement over 518 parcels of land in 400 different ownerships—state, federal, and private. These lands could not have been joined without the exercise of the power of eminent domain. Thus, this case is brought within the principles enunciated by this Court in *United States ex rel. T. V. A.* v. *Powelson*, No. 3, October Term, 1942, and for that reason, if for no other, power site value was rightly refused. Cf. *Continental Land Co.* v. *United States*, 88 F. (2d) 104, 110 (C. C. A. 9), certiorari denied, 302 U. S. 715.

2. Petitioners further contend (Pet. 8, 22–24) that the United States, when it acquires property by condemnation, must not only pay into court a

sum equal to the 'fair market value" of the property, but must, in addition, deposit in court a sum sufficient to discharge tax liens. This contention, too, is without merit.

The United States is required by the Fifth Amendment to pay "just compensation" for the property which it takes, but nothing more. When a tract of land in which various persons have separate interests or estates is taken for public use, just compensation is determined as if the property were in a single ownership, without reference to conflicting claims or liens, and then apportioned among the parties according to their respective interests. *Carlock* v. *United States,* 53 F. (2d) 926, 927 (App. D. C.); *State* v. *Superior Court,* 80 Wash. 417, 420–421, 141 Pac. 906 (1914). The compensation awarded is for the land itself, and the value of the parts cannot exceed the value of the whole. *St. Louis* v. *Rossi,* 333 Mo. 1092, 1102–1103, 64 S. W. (2d) 600 (1933); *State* v. *Hall,* 325 Mo. 165, 170, 172, 28 S. W. (2d) 80 (1930); *Burt* v. *Merchants' Ins. Co.,* 115 Mass. 1, 15 (1874); *Detroit* v. *Fidelity Realty Co.,* 213 Mich. 448, 458–459, 182 N. W. 140 (1921). See 2 Lewis, Eminent Domain (3d ed. 1909) p. 1253; 1 Nichols, Eminent Domain (2d ed. 1917) pp. 707, 708.

Taxes levied and assessed against property do not add to its value. *Pacific National Bank* v. *Bremerton Bridge Co.,* 2 Wash. (2d) 52, 57–58, 97 P. (2d) 162 (1939). Thus, even though a tax

lien or other encumbrance exceeds the value of the property, the Government can still acquire that property by paying "just compensation," whether that amount is sufficient to discharge all the encumbrances or not. *Detroit* v. *Fidelity Realty Co.,* 213 Mich. 448, 458–459, 182 N. W. 140 (1921);[2] *Housing Authority of Butte* v. *Bjork,* 109 Mont. 552, 554–555, 98 P. (2d) 324 (1940); cf. *United States* v. *Greer Drainage Dist.,* 121 F. (2d) 675 (C. C. A. 5).

Since a proceeding to condemn land for public use is a proceeding *in rem* against the land sought to be taken, it extinguishes all previously existing estates or interests in the land. *Duckett & Co.* v. *United States,* 266 U. S. 149, 151; *United States* v. *Dunnington,* 146 U. S. 338, 351, 352–353; *Weeks* v. *Grace,* 194 Mass. 296, 299–300, 80 N. E. 220 (1907). The award when made stands in place of the land, and the rights of all persons are transferred to the award. *United States* v. *Dunnington,* 146 U. S. 338, 351; *United States* v. *Certain Parcels of Land,* 44 F. Supp. 936, 937 (S. D. Cal.); *Board of Capitol Managers* v.

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[2] In the *Detroit* case, a mortgagee contended that the award could not be less than the amount of the mortgage. In rejecting this contention the court said (p. 458):

"Private property may not be taken without 'just compensation.' On the other hand, the public * * * is entitled to acquire the title upon payment of 'just compensation,' * * * just compensation is measured by the fair market value of the property. This is neither increased nor diminished by the fact that a mortgage has been executed [or, as in this case, taxes have been levied] on the property."

Braisie, 72 Colo. 153, 155–156, 210 Pac. 63 (1922); *St. Louis* v. *Rossi,* 333 Mo. 1092, 1102, 64 S. W. (2d) 600 (1933). Thus, it follows that when the United States has paid into court the fair market value of the land it has no further liability and is entitled to have all claims paid out of the funds deposited. *United States* v. *Dunnington,* 146 U. S. 338, 352–353; *United States* v. *Certain Lands in Borough of Brooklyn,* 129 F. (2d) 577, 579 (C. C. A. 2); *State* v. *Superior Court,* 80 Wash. 417, 420–421, 141 Pac. 906 (1914); see *United States* v. *Eisenbeis,* 112 Fed. 190, 199 (C. C. A. 9).

The most frequent application of this rule arises in cases holding that tax liens must be satisfied out of the award. *United States* v. *Certain Parcels of Land in Philadelphia,* 130 F. (2d) 782, 783 (C. C. A. 3); *Cobo* v *United States,* 94 F. (2d) 351, 353 (C. C. A. 6) *Coggeshall* v. *United States,* 95 F. (2d) 986, 990 (C. C. A. 4); *United States* v. *Certain Parcels of Land,* 44 F. Supp. 936, 937, 939 (S. D. Cal.); *United States* v. *44,549 Square Feet of Land,* 41 F. Supp. 523, 525 (E. D. N. Y.); *United States* v. *Certain Lands in the Town of Hempstead,* 31 F. Supp. 513 (E. D. N. Y.); *Board of Capitol Managers* v. *Braisie,* 72 Colo. 153, 155–156, 210 Pac. 63 (1922); *Ross* v. *Gates,* 183 Mo. 338, 347–348, 81 S. W. 1107 (1904); *In re Sleeper,* 62 N. J. Eq. 67, 68–69, 49 Atl. 549 (1901); see *People of Puerto Rico* v. *United States,* 131 F. (2d) 151 (C. C. A. 1); cf. *United States* v. *Lands*

in Hempstead, Nassau Cy., N. Y., 129 F. (2d) 918, 919–920 (C. C. A. 2); *St. Paul* v. *Certain Lands in St. Paul*, 48 F. (2d) 805, 807 (C. C. A. 8).

In the instant case the verdict of $7,950.35 which the jury was directed to return in favor of the Washington Water Power Company represents the fair market value of the land (R. 45). In fact, there was no evidence to support a different award. To require the Government to pay to Stevens and Ferry Counties an additional $3,006.96 would mean that the Government, in order to acquire property by condemnation, would have to pay more than the "just compensation" prescribed by the Fifth Amendment. It is evident, therefore, that the claim for taxes must be satisfied out of the sum deposited with the declaration of taking and found by the court to be the fair market value of the property.

The tax statutes of Washington do not purport, even if they could, to dictate any contrary result. Section 11265, Wash. Rev. Stat. Ann. (Remington 1932, as amended) provides that a tax lien upon real estate does not, as between grantor and grantee, attach until February 15 of the year after the taxes are levied. The taxes in question were assessed and levied in 1939 (R. 66, 76, 79, 84). The Government took title to this property when it filed its declaration of taking on December 9, 1939 (R. 33). Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258a. Hence, if the United

States is a grantee under that statute, no lien could attach as against the Government until February 15, 1940. That a condemnor is a "grantee" under the foregoing statute has been expressly decided by the Supreme Court of Washington. *Bethany Presbyterian Church* v. *Seattle,* 154 Wash. 529, 282 Pac. 922 (1929); cf. *Commissioner* v. *Plestcheeff,* 100 F. (2d) 62 (C. C. A. 9).

Indeed since no tax lien attaches against the condemnor until February 15 of the year following the levying and assessment of the tax, no tax lien can ever arise against this property which the Government condemned and for which it has paid just compensation, because lands belonging to the United States cannot be taxed by the State of Washington or its political subdivisions. Wash. Const., Art. 7, sec. 2; Wash. Rev. Stat. Ann. (Remington 1932) sec. 11111; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 179–180.

The case of *United States* v. *Alabama,* 313 U. S. 274, relied on by petitioners (Pet. 23), announces no contrary doctrine. There the United States, subsequent to the tax lien date but prior to an actual levy and assessment, *purchased* certain lands in Alabama. This Court held that under Alabama law the lien was effective and that the United States, like any other purchaser, would have to discharge that lien if it desired an unencumbered title. But when the United States *condemns* land, it can acquire an absolute fee by

paying into court the fair market value of the property—just compensation. Any tax or mortgage liens, as all the foregoing authorities agree, must be satisfied out of the award.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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